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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY ROBERT WHEELER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional and statutory provisions involved	2
Statement	3
Reasons for granting the petition	6
Conclusion	22
Appendix A	1a
Appendix B	9a
Appendix C	10a

CITATIONS

Cases:

Abbate v. *United States*, 359 U.S. 187	5, 16, 17
Ashe v. *Swenson*, 397 U.S. 436	21
Barta v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553	12
Blackledge v. *Perry*, 417 U.S. 21	20
Colliflower v. *Garland*, 342 F.2d 369	14
DeCanas v. *Bica*, 424 U.S. 351	17
Diaz v. *United States*, 223 U.S. 442	20, 21
Fisher v. *District Court*, 424 U.S. 382	12
Grafton v. *United States*, 206 U.S. 333	16, 17
Gray v. *United States*, 394 F.2d 96, certiorari denied, 393 U.S. 985	8-9
Iron Crow v. *Oglala Sioux Tribes of Pine Ridge Res.*, 231 F.2d 89	14

Cases—Continued

	Page
Jones v. *Rath Packing Co.*, No. 75-1053, decided March 29, 1977	17
Keeble v. *United States*, 412 U.S. 205	13
McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164	5, 11, 17
Oliphant v. *Schlie*, 544 F.2d 1007, petition for a writ of certiorari pending *sub nom. Oliphant* v. *The Squamish Indian Tribe, et al.*, No. 76-5729	13, 14
O'Neal v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140	18
Ortiz-Barraza v. *United States*, 512 F.2d 1176	14
Pennsylvania v. *Nelson*, 350 U.S. 497	17
Reina v. *United States*, 364 U.S. 507	17
Roff v. *Burney*, 168 U.S. 218	11
Sam v. *United States*, 385 F.2d 213	9
Santa Clara Pueblo v. *Martinez*, No. 76-682, certiorari granted May 16, 1977	12
Settler v. *Lameer*, 507 F.2d 231	14
Talton v. *Mayes*, 163 U.S. 376	11, 15
Tom v. *Sutton*, 533 F.2d 1101	14
United States v. *Antelope*, No. 75-661, decided April 19, 1977	10-11, 13
United States v. *Burns*, 529 F.2d 114	
United States v. *DeCoteau*, 516 F.2d 16	8
United States v. *DeMarrias*, 441 F.2d 1304	8
United States v. *Kagama*, 118 U.S. 375	12
United States v. *Keeble*, 459 F.2d 757, reversed, 412 U.S. 205	8
United States v. *Kills Plenty*, 466 F.2d 240	8, 14
United States v. *Lanza*, 260 U.S. 377	16

Cases—Continued

	Page
United States v. *Mazurie*, 419 U.S. 544	11, 12
United States v. *Quiver*, 241 U.S. 602	11, 13
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506	12
Waller v. *Florida*, 397 U.S. 387	17
Williams v. *Lee*, 358 U.S. 217	11, 19
Worcester v. *Georgia*, 6 Pet. 515	11

Constitution, statutes and regulation:

United States Constitution:	
Article 1, Section 8, clause 3	10
Fifth Amendment (Double Jeopardy Clause)	2, 4, 5, 7, 10, 15, 17, 20
Act of March 3, 1817, 3 Stat. 383	12
Act of March 27, 1854, 10 Stat. 269	12
Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585	13
Major Crimes Act of March 3, 1885, 23 Stat. 362, as amended, 18 U.S.C. 1153	2, 4, 6, 7, 8, 12
Pub. L. 93-580, 88 Stat. 1910, as amended, 25 U.S.C. (Supp. V) 174	9
18 U.S.C. 1152	12
18 U.S.C. 2032	3, 6
25 U.S.C. 1302(7)	8
Ariz. Rev. Stat. Ann. (1956):	
Section 13-252	4
Sections 13-821 and 13-822	21
25 C.F.R. 11.1 *et seq.*	18

Miscellaneous:

American Indian Policy Review Commission (Final Report May 17, 1977)	9, 18, 19

Miscellaneous—Continued Page

Brophy and Aberle, *The Indian: America's Unfinished Business* (1966) 19
Cohen, *Federal Indian Law* (1958 ed.) 11, 12
Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311 (1969) 18
Navajo Tribal Code, Title 17 (1972):
Section 321 4
Section 531 ..... 3, 4
Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights In Conflict*, 22 Univ. of Kans. L. Rev. 387 (1974) 19

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 545 F.2d 1255.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on December 2, 1976. A petition

for rehearing with a suggestion for rehearing *en banc* was denied on March 23, 1977 (App. C, *infra*). On April 13, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including May 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars federal prosecution of an Indian defendant for violation of the Major Crimes Act (18 U.S.C. 1153) because of his earlier conviction in Indian tribal court of a lesser included offense arising from the same acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 1153 provides in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

* * * * *

18 U.S.C. 2032 provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

Title 17, Section 531, of the Navajo Tribal Code (1972) provides:

> Any Indian who shall willfully contribute to the delinquency of any minor shall be deemed guilty of an offense and, upon conviction thereof, shall be sentenced to labor for a period not to exceed 6 months.

STATEMENT

On October 16, 1974, an incident involving a young Indian girl occurred on the Navajo Indian Reservation in Many Farms, Arizona. Respondent, a Navajo Indian, was found intoxicated and taken into custody by an Indian policeman in connection with the incident (R.T. 10, 13). Two days later, he pleaded

guilty in the Navajo Tribal Court to charges of willfully contributing to the delinquency of a minor and disorderly conduct, in violation of Title 17, Sections 531 and 321, of the Navajo Tribal Code (1972) (App. A, *infra*, p. 2a). Respondent was sentenced to serve 60 days at hard labor [1] or to pay a fine of $120. (The record does not show how the sentence was carried out.)

On May 21, 1975, an indictment was returned in the United States District Court for the District of Arizona charging that respondent, on October 16, 1974, "did assault * * * with intent to rape" the Indian girl, in violation of the Major Crimes Act, 18 U.S.C. 1153, and Ariz. Rev. Stat. Ann. § 13-252 (1956). This indictment was dismissed on grounds not relevant here.[2] A superseding indictment returned on November 19, 1975, charged that on October 16, 1974, respondent "did carnally know a female Indian * * *, not his wife, who had not then attained the age of sixteen years but was fifteen years of age," in violation of 18 U.S.C. 1153 and 2032.

Respondent moved to dismiss this indictment on the ground that his federal prosecution was barred by the Double Jeopardy Clause of the Fifth Amend-

[1] Respondent was sentenced to concurrent terms of 60 days on the contributing to the delinquency of a minor charge and 15 days or $30 on the disorderly conduct charge.

[2] The district court determined that a provision of 18 U.S.C. 1153 (since deleted from the statute) giving the court discretion to impose imprisonment for the crimes of rape and assault with intent to rape when committed by an Indian against a female Indian was impermissibly vague.

ment because of his previous conviction in tribal court of a lesser included offense arising from the same transaction. The district court granted the motion to dismiss.

The court of appeals affirmed. The court framed the primary issue as "whether Indian tribal courts and federal district courts are 'arms of different sovereigns' for purposes of the Double Jeopardy Clause" (App. A, *infra*, p. 1a). The court noted that tribal courts "are not merely a political unit of the Federal Government" and that the Indians are a "separate people, with the power of regulating their internal and social relations" (*id.* at 4a-5a, quoting *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 173). But the court concluded that the Indian tribes "do not have the sovereign status of a state" (App. A, *infra*, p. 5a), and thus that "Indian tribal courts and United States district courts are not arms of separate sovereigns" (*id.* at 6a). On this basis the court rejected the proposition that the federal prosecution here was permitted by analogy to the "dual sovereignty" rationale adopted by this Court in the federal-state context, see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187.

The court then invoked the rule, which it viewed as settled, that the Double Jeopardy Clause bars prosecution of a defendant for a crime after he has previously been convicted by the same sovereign of a lesser included offense based upon the same acts (App. A, *infra*, p. 7a). The court therefore held that "an individual cannot be indicted in federal

court for a crime after having been tried in Indian tribal court for a lesser included offense" (*id.* at 8a). With respect to the charges here, the court determined that the offense of willfully contributing to the delinquency of a minor (one of the tribal offenses) was a lesser included offense to carnal knowledge of a female under the age of 16 years (the federal charge) (*id.* at 7a-8a).[3]

REASONS FOR GRANTING THE PETITION

1. The court of appeals' holding in this case means that an Indian who is convicted (or, by the same token, who is acquitted) in tribal court of a violation of tribal law that constitutes a lesser included offense to one of the enumerated Major Crimes (18 U.S.C. 1153) may not subsequently be tried in federal district court for the greater or "inclusive" offense arising from the same act. As a result of this holding, respondent has avoided prosecution for a major federal crime, for which he was liable to be imprisoned for up to 15 years (18 U.S.C. 2032), by pleading guilty to a minor offense in tribal court and thereby incurring a relatively minor sentence. This result is unjust[4] and is not required by the command of the Double Jeopardy Clause.

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[3] Although in the court of appeals we contended that the tribal offense was not a lesser included offense to the federal charge, we do not present this as a question in the petition because it is not of sufficient general importance to warrant review by this Court.

[4] While the offense with which respondent is here charged —carnal knowledge of a minor female—does not necessarily entail any use of force by the defendant, there was here at least a prima facie case of forcible sexual assault (as is evidenced by the original indictment for assault with intent to commit rape, which was dismissed on technical grounds unrelated to respondent's culpability, see note 2, *supra*). If respondent indeed committed a forcible sexual assault, the sentence imposed by the tribal court, which respondent could satisfy by paying a fine of $120, hardly seems just punishment.

If permitted to stand, the decision of the court of appeals will jeopardize effective law enforcement on Indian reservations and may necessitate extensive restructuring of the respective jurisdictions or procedures of tribal and federal courts with respect to cases arising on Indian reservations. If the court of appeals is correct, Indians who commit major crimes such as murder, arson, or rape, which subject them to federal prosecution and the possibility of significant punishment under 18 U.S.C. 1153, would secure immunity from such prosecution by standing trial on a minor offense in Indian tribal court that is a lesser-included offense of the major crime giving rise to federal court jurisdiction. Moreover, since federal prosecutors have no control over the institution and disposition of proceedings in tribal court, federal authorities would be virtually powerless to prevent potential major-crimes defendants from acquiring immunity from meaningful prosecution by undergoing tribal court trial on a petty offense. Tribal proceedings in any event are often held so swiftly that federal prosecutors may not even be aware of the commission of the offense by the time

the tribal trial has been held, let alone be able to present the matter to a grand jury and convene a trial; here, for instance, the sexual assault occurred on October 16 and respondent pleaded guilty to the tribal offense on October 18 (see App. A, *infra*, p. 2a).

The possibility of large numbers of such occurrences is substantial. In addition to the present case, there are numerous reported instances in which an Indian defendant in federal court has been previously tried in a tribal court for a minor offense arising out of the same acts. See, *e.g.*, *United States* v. *Keeble*, 459 F.2d 757 (C.A. 8), reversed, 412 U.S. 205; *United States* v. *Kills Plenty*, 466 F.2d 240 (C.A. 8); *United States* v. *DeCoteau*, 516 F.2d 16 (C.A. 8); *United States* v. *DeMarrias*, 441 F.2d 1304 (C.A. 8); see *United States* v. *Walking Crow*, Cr. 76-3053 (D. S.D.), appeal pending C.A. 8 (No. 77-1136).

The problem is exacerbated by the fact that Indian tribal courts lack jurisdiction to impose significant punishment for criminal offenses. Indian tribal courts may "in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both * * *." 25 U.S.C. 1302(7). Jurisdiction to prosecute major felonies committed by Indians within Indian country has been given to federal courts under 18 U.S.C. 1153. See, *e.g.*, *Gray* v. *United States*, 394 F.2d 96 (C.A. 9), certiorari denied, 393 U.S. 985; *Sam* v. *United States*, 385 F.2d 213 (C.A. 10). Yet the holding of the court of appeals here will effectively remove from federal courts the power to try offenders for major crimes committed in Indian country in the potentially numerous cases in which a defendant has first been tried on a minor offense in a tribal court.

Because of the impediment it creates to effective federal law enforcement, the decision in this case ultimately threatens to impair the jurisdictional balance between Indian tribes and the federal government that has evolved historically in response to the legitimate competing interests of both of these separate governmental entities. It is reasonable to predict that this decision will generate considerable pressures upon the Congress further to circumscribe the authority of the Indian tribes in criminal matters, and thus to impede current efforts to strengthen the autonomy and authority of the tribal courts to regulate internal Indian affairs. As the American Indian Policy Review Commission[6] has stated with specific reference to this case (Final Report, p. 5-29):

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[6] The Commission was established by Pub. L. 93-580, Jan. 2, 1975, 88 Stat. 1910, "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians" (25 U.S.C. (Supp. V) 174). The Commission's Report was submitted to the Congress on May 17, 1977.

The implications of [the *Wheeler*] decision for jurisdiction of Indian tribes and for the power of Congress to take corrective action through legislation are apparent. If the doctrine of double jeopardy is applicable to judgments of tribal courts, there seems little doubt that either the Courts or Congress will soon strip the tribes of authority to act in any situation which might potentially be prosecuted in Federal court. It is simply not tolerable that a person can plead guilty in tribal court to a minor offense and thereby preclude prosecution in Federal court for a major offense. It is essential that the separate sovereignty of the tribes continue to be recognized if the jurisdictional balance between tribal and Federal courts is to be maintained.

The dilemma thus posed by the court of appeals' decision—between serious impairment of federal prosecutorial authority, on the one hand, and perhaps severe curtailment of the jurisdiction of tribal courts, on the other—is sufficiently significant to warrant this Court's attention. Moreover, in our view the decision of the court of appeals is incorrect. For the reasons explained briefly below, there is no bar under the Double Jeopardy Clause to the federal prosecution in this case.

2. a. The Indian tribes are treated in the United States Constitution *in pari materiae* with States and foreign nations. Article I, Section 8, clause 3. While recognizing that the Indian tribes are no longer sovereign nations—they are "once-sovereign political communities" (*United States* v. *Antelope*, No. 75-661,

decided April 19, 1977, slip op. 5)—this Court has repeatedly emphasized that they possess a "unique status * * * as 'a separate people' with their own political institutions" (*ibid.*), that they "are unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557), and that the statutes and treaties defining their relations with other governments must be read against the "backdrop" of their former sovereignty as nations (*McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 172).

As a part of the Indian tribes' "unique status," this Court has recognized that in the absence of an explicit withdrawal of jurisdiction by Congress, the power to try and punish criminal behavior by Indians within Indian country inheres in tribal courts, and that the power of these tribal courts does not depend upon an express grant of power from Congress but is a residual attribute of tribal sovereignty that often has been expressly recognized by treaty. *Worcester* v. *Georgia*, 6 Pet. 515; *Talton* v. *Mayes*, 163 U.S. 376; *United States* v. *Quiver*, 241 U.S. 602, 605; see Cohen, *Federal Indian Law* 395 (1958 ed.).*

* The decisions of this Court have consistently emphasized that "the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee*, 358 U.S. 217, 220) is an unextinguished residuum of the tribes' ancient sovereignty. It is settled, for example, that the tribes, like other governmental entities, have the authority to confer or withdraw citizenship in the tribe in the absence of express legislation by Congress to the contrary. *Roff* v. *Burney*, 168 U.S. 218, 222;

Congress also has acknowledged the residual sovereignty of the tribes. Almost from the first federal assertion of statutory jurisdiction, Congress provided that "nothing in the • • • [statute] • • • shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian territory." Act of March 3, 1817, 3 Stat. 383; see Act of March 27, 1854, 10 Stat. 269, 270; 18 U.S.C. 1152. Even the Major Crimes Act (Act of March 3, 1885, 23 Stat. 362, 385), which made it a federal crime for an Indian to commit any of seven named major offenses

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Cohen, *Federal Indian Law*, *supra*, at 414. Cf. *Santa Clara Pueblo* v. *Martinez*, No. 76-682, certiorari granted May 16, 1977. Similarly, as with other peoples who possess "the power of regulating their internal and social relations" (*United States* v. *Kagama*, 118 U.S. 375, 382), the tribes possess broad authority to grant marriages and divorces (*United States* v. *Quiver*, *supra*) and to provide for adoptions and guardianships. *Fisher* v. *District Court*, 424 U.S. 382. Furthermore, unless Congress has provided otherwise, the tribes are immune from suit in state or federal court, protected in much the same way as the Eleventh Amendment protects the States or the principle of sovereign immunity protects the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512. Finally, the tribes possess inherent authority to tax (*e.g.*, *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (C.A. 8)) and to regulate conduct on the reservation involving both Indians and non-Indians (*e.g.*, *United States* v. *Mazurie*, 419 U.S. 544 (upholding, as to non-Indians, a tribal ordinance requiring a license to sell liquor in Indian country)).

against another Indian on an Indian reservation,[7] is properly viewed only as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." See *Keeble* v. *United States*, 412 U.S. 205, 209, quoted in *United States* v. *Antelope*, *supra*, slip op. 1-2 n. 1.[8]

Accordingly, the Navajo Tribal Court, in which respondent was convicted, functions not as an instrumentality of the federal government but as an institution whose authority flows from the residual sovereignty of the tribes as "a separate people."[9] With-

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[7] The Act presently includes 14 enumerated offenses. See Indian Crimes Act of May 29, 1976, Pub. L. 94-297, 90 Stat. 585.

[8] After enactment of the Major Crimes Act, the Court in *United States* v. *Quiver*, *supra*, reaffirmed the principle that punishment for offenses by one Indian against another, other than for those offenses enumerated in the Major Crimes Act, remains within the exclusive jurisdiction of the tribes. This principle, the Court said (241 U.S. at 605-606), was "in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise[.]"

[9] In *Oliphant* v. *Schlie*, 544 F.2d 1007 (C.A. 9), petition for a writ of certiorari pending *sub nom. Oliphant* v. *The Suquamish Indian Tribe, et al.*, No. 76-5729, the court of appeals, in holding that a tribal court could properly try and convict a non-Indian for certain tribal offenses, reasoned that "the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish [tribe] originally possessed" (544 F.2d at 1009). In the court's view, the question was "not whether Congress has conferred jurisdiction

in its sphere of authority, the tribal court's jurisdiction is exclusive. The powers exercised by tribal authorities over tribal Indians within a reservation thus more closely resemble the powers customarily exercised by a State than those of the federal government.

[over non-Indians] upon the tribe. The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question * * * is, did Congress (or a treaty) take that jurisdiction away" (544 F.2d at 1009 n. 1).

The Ninth Circuit's statements in *Oliphant* concerning Indian sovereignty are inconsistent with its view in this case that "Indian tribal courts and United States district courts are not arms of separate sovereigns" (App. A, *infra*, p. 6a). Indeed, the Ninth Circuit has been inconsistent in other cases as well on the question whether, or for what purposes, the tribal courts are agents of the same sovereign as the federal district courts. In *Tom* v. *Sutton*, 533 F.2d 1101, the court rejected a claim that either the Sixth or the Fourteenth Amendment entitles defendants in tribal criminal proceedings to appointed counsel. Citing *Talton* v. *Mayes*, *supra*, and other cases, the court stated (533 F.2d at 1103): "The rationale underlying these cases is that the Indian tribes are quasi-sovereign nations. * * * Under their sovereign status, the Indian tribes are vested with the inherent power to create and administer a criminal justice system." The court added (533 F.2d at 1103 n. 1) that the Indian Citizenship Act (8 U.S.C. 1401) "did not destroy the existence or sovereignty of the Indian tribes or their jurisdiction over their members." See also *Settler* v. *Lameer*, 507 F.2d 231 (C.A. 9); *Ortiz-Barraza* v. *United States*, 512 F.2d 1176 (C.A. 9). But see *Colliflower* v. *Garland*, 342 F.2d 369 (C.A. 9).

The Eighth Circuit in *United States* v. *Kills Plenty*, *supra*, 466 F.2d at 243, when similarly confronted with "the troublesome contention that tribal courts and United States District Courts derive their adjudicatory powers from the same sovereign," stated (in *dictum*) that "it is our view that the Tribal Courts are not arms of the same sovereign as the United States District Court" (466 F.2d at 243 and n. 3). See *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89 (C.A. 8).

The court of appeals said, however (App. A, *infra*, pp. 5a-6a), that Indian tribes cannot meaningfully be regarded as separate political entities because the federal government has complete power over Indian affairs and, in particular, "has complete, plenary control over the criminal jurisdiction of tribal courts." But this reasoning is beside the point. As this Court stated in *Talton* v. *Mayes*, *supra*, 163 U.S. at 384: "[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States."

In *Talton*, the Court held that the Fifth Amendment does not apply to the Indian tribes, because the powers that they exercise are not "federal powers" but are inherent in their status as quasi-sovereigns: "It follows that as the powers of local self government * * * existed prior to the Constitution, they are not operated upon by the Fifth Amendment * * *" (163 U.S. at 384). The court of appeals' analysis in this case is fundamentally inconsistent with the analysis in *Talton*. Tribal courts cannot at the same time be so autonomous that the Fifth Amendment does not apply to tribal judicial proceedings, yet so identified with the federal government that a tribal prosecution is viewed as nothing more than prosecution by an arm of the federal sovereign.

b. Since tribal prosecutions are not prosecutions by an arm of the federal sovereign, the Double Jeopardy Clause should not apply to bar prosecution

in federal court after prosecution in a tribal court for a lesser included offense arising out of the same acts. The tribes and the federal government, "deriving power from separate sources," have each separately determined "what shall be an offense against its peace and dignity" (*United States* v. *Lanza*, 260 U.S. 377, 283). Here, for example, respondent's conduct violated a tribal ordinance designed to enforce the tribe's interest in maintaining the internal peace and order of the Indian community, and respondent therefore properly was subject to punishment by the tribal court. At the same time his conduct also may have constituted a major federal crime. Each governmental unit—federal and tribal—should be entitled to give effect to its separate peace-keeping interest.

In many respects, the consequences outlined above (pp. 6-10) of the court of appeals' holding to the contrary are analogous to the "undesirable consequences" that persuaded this Court in *Abbate* v. *United States*, *supra*, 359 U.S. at 195, to reject a plea that it overrule its holding in *Lanza* that a previous conviction by a state does not operate as a constitutional bar to federal prosecution for the same acts.[10] In both contexts, federal law enforcement

[10] The court of appeals stated that if "forced to choose a relevant analogy" (App. A, *infra*, 5a) by which to define the status of tribal courts, it would select not state courts, but territorial courts, which were described by this Court in *Grafton* v. *United States*, 206 U.S. 333, as "civil court[s] proceeding under the authority of the United States" (App. A, *infra*, pp. 5a-6a). But, unlike tribal courts generally, the

would "necessarily be hindered" (359 U.S. at 195) if the Double Jeopardy Clause were held to bar a federal prosecution following a prosecution by the other governmental authority.

Moreover, although its power is not plenary (as it is with Indian tribes), Congress has substantial authority to preempt state criminal jurisdiction,[11] yet "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law" (*ibid.*). This same analysis also should apply to Indian tribal courts. As in the case of States, the

Philippine territorial court under consideration in *Grafton* plainly was an "instrumentality" of the federal government. It "owe[d] its existence wholly to the United States," from which it "derive[d] its powers" and by whose authority it "exert[ed]" them (206 U.S. at 354. Its relation to the federal government was, as this Court has since observed (*Waller* v. *Florida*, 397 U.S. 387), closely akin to the relationship between municipal and state governments, the powers of the former "spring[ing] from the same organic law that create[s]" the powers of the latter (397 U.S. at 393). But since it "would [be] vastly oversimpli[fied] • • • to say that nothing remains of the notion that reservation Indians are a separate people" with power "to make their own laws and be ruled by them" (*McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 170, 172), this analogy is inapposite to the relationship between the federal government and the Indian tribes. If there need be any "relevant analogy," it should be to the state-federal "dual prosecution" doctrine.

[11] See, *e.g.*, *Jones* v. *Rath Packing Co.*, No. 75-1053, decided March 29, 1977; *DeCanas* v. *Bica*, 424 U.S. 351; *Reina* v. *United States*, 364 U.S. 507; *Pennsylvania* v. *Nelson*, 350 U.S. 497.

mere existence of the federal government's authority to preempt tribal court criminal jurisdiction does not mean that the federal government is constitutionally required to exercise that authority in order to insure that its own law enforcement efforts are not hindered.

Displacement of Indian tribal court jurisdiction not only would "bring about a marked change in the distribution of powers to administer criminal justice" (359 U.S. at 195) between the Indian and federal courts, but also would be at odds with efforts of the federal government to foster tribal self-government. There currently are tribal courts operating on approximately 71 reservations,[12] handling tens of thousands of cases per year.[13] These courts generally are viewed as central to the preservation of Indian culture and political identity. See, *e.g.*, *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-1145 (C.A. 8).

The Final Report of the American Indian Policy Review Commission (p. 5-42) includes a finding

[12] This figure is obtained from statistics compiled by the Department of Interior as of March 18, 1977. In addition to the "tribal courts," there are 16 "traditional" or semi-religious courts, possessing no written ordinances, and 32 Courts of Indian Offenses ("C.F.R." courts) established by the Department of Interior for reservations that possess no judicial institutions (see 25 C.F.R. 11.1 *et seq.*). See Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311, 321-322 (1969).

[13] Tribal courts, together with the courts listed in note 12, *supra*, handle an estimated 80,000 or more cases per year. American Indian Policy Review Commission (Final Report, p. 5-36).

that tribal courts, though varying greatly in individual performance,[14] on the whole "are evolving institutions that are capable of fair and efficient justice." The Report recommends that Congress take steps to promote their "maintenance and development"—development that "will require tribal experimentation and time." The decision of the court below, however, seriously threatens any efforts to enhance the capability and authority of the tribal courts. As one commentator has stated: "If, ultimately, tribal criminal trials were to become protective mechanisms for potential Major Crimes Act defendants, a political resolution of the situation in Congress would probably result, and that resolution would undoubtedly see a further cutback in tribal criminal jurisdiction." Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Univ. of Kans. L. Rev. 387, 406 (1974); see Final Report, *supra*, at p. 5-29.

3. We submit alternatively that, even if the federal and the tribal courts are viewed as "arms" of the same sovereign, the Double Jeopardy Clause does not bar the federal prosecution in this case. The decision of the court of appeals rests on the assumption that

[14] The Navajo Tribal Court, in which respondent here was convicted, is one of the most highly developed of the tribal judicial systems, possessing, for example, its own complete legal code applicable to the more than 100,000 tribal members. See *Williams* v. *Lee*, *supra*, 358 U.S. at 222; Brophy and Aberle, *The Indian: America's Unfinished Business* 59 (1966).

the Double Jeopardy Clause always bars prosecution of a defendant for a crime after a previous conviction by the same sovereign of a lesser included offense based on the same acts. But, as we argued in our brief in *Jeffers* v. *United States*, No. 75-1805, argued March 21, 1977 (Br. 13-15, 39-47), it does not violate the Double Jeopardy Clause to prosecute a defendant for a greater offense after having successfully prosecuted him on a lesser included offense, so long as he was not in jeopardy on the greater offense at the first trial and is not placed in jeopardy again on the lesser included offense at the second trial.[15] See *Diaz* v. *United States*, 223 U.S. 442, 449. When such a defendant is tried on the lesser offense, he is not in jeopardy of conviction of and punishment for the greater. And if he is convicted of the lesser (see Br. 41-42), in a subsequent prosecution for the greater the defendant can be fully protected from being "twice put in jeopardy" for the lesser offense by measures less drastic than barring the second trial altogether (see Br. 47 n. 27).[16]

In this case, respondent was not put in jeopardy of conviction of carnal knowledge in the tribal court. His federal trial would therefore be the first jeopardy

[15] We are furnishing a copy of our brief in *Jeffers* to counsel for petitioner.

[16] If the prosecution has unfairly and unreasonably subjected a defendant to a series of prosecutions for related offenses of escalating gravity, the defendant would have a remedy under the Due Process Clause. Cf. *Blackledge* v. *Perry*, 417 U.S. 21.

of conviction of carnal knowledge to which he would be exposed. Moreover, respondent would not again be in jeopardy for the tribal offense during his federal trial, since the federal court has no jurisdiction over offenses listed in the Navajo Tribal Code.[17] Accordingly, prosecution in federal court following the conviction in tribal court would not place respondent twice in jeopardy for either offense. Respondent should therefore not be insulated from the federal prosecution. Cf. *Ashe* v. *Swenson*, 397 U.S. 436, 453 n. 7 (concurring opinion of Mr. Justice Brennan).

[17] There is only one way in which a charge of contributing to the delinquency of a minor might be considered in federal court despite that court's lack of independent jurisdiction over the offense—*i.e.*, if the defendant requested such a charge upon the authority of *Keeble* v. *United States*, *supra*. (The lesser-included offense would presumably have to be derived from state rather than tribal law; here, Arizona has a statute proscribing acts contributing to the delinquency of a minor (Ariz. Rev. Stats. Ann. §§ 13-821, 13-822), although the elements are slightly different from those of the tribal offense). Since it would be up to the defendant to request such a charge, he may easily avoid the risk of conviction on the delinquency offense by not requesting that it be charged. And even if a verdict were returned on the lesser offense, no judgment could be entered or punishment administered upon such a verdict if the same sovereign had already tried the defendant for the offense. See *Diaz* v. *United States*, *supra*, 223 U.S. at 449.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1509

[Filed Dec. 2, 1976, U. S. Court of Appeals, Emil E. Melfi, Jr., Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ANTHONY ROBERT WHEELER, DEFENDANT-APPELLEE

Appeal from the United States District Court for the District of Arizona

Before: GOODWIN and SNEED, Circuit Judges, and EAST,* District Judge.

OPINION

SNEED, Circuit Judge:

This case presents the question whether Indian tribal courts and federal district courts are "arms of different sovereigns" for purposes of the Double Jeopardy Clause.[1] We hold that they are not arms

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] While the court in United States v. La Plant, 156 F. Supp. 660, 662 (D.C. Mont. 1957) granted defendant's motion to

of separate sovereigns and, therefore, that an individual cannot be tried for the same offense before both an Indian tribal court and court of the United States Government. Furthermore, we hold that the guarantee against double jeopardy has been violated in this case.

The defendant, a Navajo Indian, plead guilty in Navajo tribal court on October 18, 1974 to charges of contributing to the delinquency of a minor [2] and disorderly conduct,[3] the charges growing out of an incident that had occurred on Indian territory two days earlier. Over a year later the defendant was indicted in federal court for carnal knowledge of a female Indian under the age of sixteen years.[4] There is no dispute that the federal charge grew out of the same incident and the same actions of the defendant as the "contributing to the delinquency of a minor" charge before the Navajo tribal court. Before trial,

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dismiss "on the ground that defendants would be placed in double jeopardy by reason of conviction for the same offense in the Blackfeet Tribal Court," the Government had conceded the issue in its brief.

See also U. S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 447-448 (1958), asseverating that "the punishment of an Indian under ['the local law of the tribe'] must be deemed a bar to further prosecution under any applicable Federal laws, even though the offense be one against a non-Indian," but backing this conclusion neither with citations nor with discussion.

[2] Title 17, section 321 of the Navajo Tribal Code.

[3] Title 17, section 351 of the Navajo Tribal Code.

[4] 18 U.S.C. §§ 1153, 2032 (1970).

the district court judge dismissed the indictment "on the basis that the defendant [had] already once been placed in jeopardy for the same offense." We affirm.

I.

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. However, the Supreme Court held early in its history that the Double Jeopardy Clause does not prevent a federal court from trying a person for the same crime for which he had been tried previously by a state court, and vice-versa. *See Moore* v. *Illinois*, 55 U.S. (14 How.) 13 (1852).[5] As explained by the Court:

> Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for infraction of the laws of either. The same act may be an offense or transgression of the laws of both . . . . That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable.

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[5] Despite criticism from within the Court, this "exception" to the double jeopardy guarantee has been repeatedly reaffirmed. *See, e.g.*, Abbate v. United States, 359 U.S. 187 (1959).

Id. at 20. The Court has construed its "dual sovereignty" rationale narrowly and has never applied it outside of the federal court or state court context.[6] The Court has held that the double jeopardy guarantee proscribes prosecution in United States territorial court once the defendant has been tried for the same crime in federal military court, *see Grafton* v. *United States*, 206 U.S. 333 (1907), and also proscribes parallel prosecutions in state and municipal courts, *see Waller* v. *Florida*, 397 U.S. 387 (1970). According to the Court, these latter cases involve prosecutions before two courts of a single sovereign.

In the instant case, we are faced by a dual trial situation that does not fit neatly into either the "single sovereign" or "dual sovereign" categories. Indian tribal courts are not merely a political unit of the Federal Government, such as federal district courts, military tribunals, etc. Indian tribes do maintain a "semi-independent position" within the borders of the United States. *See McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172-173 (1973), *quoting United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886). But, at the same time, they

[6] As the Supreme Court recognized in United States v. Kagama, 118 U.S. 375 (1886), there are only two sovereign entities within the United States: the federal government and the states. "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two." 118 U.S. at 379.

clearly do not have the sovereign status of a state. Nor is their "semi-independence" like that accorded the Commonwealth of Puerto Rico.[7] As emphasized in *McClanahan*, *supra*, Indian tribes enjoy semi-independent status *"not as States, not as Nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside." 411 U.S. at 173, *quoting Kagama*, *supra*, 118 U.S. at 381-382 (emphasis added). The federal government has complete, plenary control over the criminal jurisdiction of tribal courts. *See Winton* v. *Amos*, 255 U.S. 373 (1921); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). It possesses no such control with respect to the states.

It follows that *Moore* v. *Illinois*, *supra* and its progeny are not applicable to the instant case. The double jeopardy guarantee applies. If forced to choose a relevant analogy by which to guide our decision in this case from amongst the courts considered by the Supreme Court in the double jeopardy-"dual sover-

[7] Congress, in 1952, entered into a "compact" with "the people of Puerto Rico," giving Puerto Rico "Commonwealth" status and "the degree of autonomy and independence normally associated with States of the Union." Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 96 S. Ct. 2264, 2277-2279 (1976). As the Court in Flores de Otero noted, Puerto Rico's status is *sui generis*; "Puerto Rico occupies a relationship to the United States that has no parallel in our history." *Id.* at 2278.

eignty" context, we would select territorial courts, described in *Grafton* v. *United States*, *supra*, as "civil court[s] proceeding under the authority of the United States"; as already indicated, territorial courts are prevented by reason of double jeopardy from trying an individual for the same offense for which he already has been convicted by a United States military court. We find support for our conclusion that the double jeopardy guarantee applies here in *Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965). There, this court reviewed the history of a tribal court system substantially similar to the history of the Navajo courts and concluded that

> [i]n spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government.

Id. at 378-379.

In summary, Indian tribal courts and United States district courts are not arms of separate sovereigns. Indian tribes are not states. Thus, the defendant in the instant case could not be tried in federal district court for the same offense that he was previously convicted of in Navajo tribal court without violating the Double Jeopardy Clause of the Fifth Amendment.

II.

The Government argues that, even assuming the double jeopardy guarantee applies in the case before us, the defendant is not being tried for the same offense in federal court as he was convicted of in tribal court. We disagree.

A defendant does not have to be charged with the exact same offense before both courts in order for double jeopardy to exist. The double jeopardy guarantee is also violated where one of the charges is a "lesser included offense" of the other—where every violation of one charge necessarily constitutes a violation of the other. *See Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); *Gavieres* v. *United States*, 220 U.S. 338 (1911); *Henry* v. *United States*, 215 F.2d 639, 641 (9th Cir. 1954).

In the instant case, "contributing to the delinquency of a minor" (one of the two tribal court charges) is a lesser included offense to "carnal knowledge of a female under the age of sixteen years" (the federal charge). The two charges grew out of the same actions of the defendant. And the evidence necessary to convict the defendant of carnal knowledge would have been sufficient to convict the defendant of contributing to the delinquency of a minor. We find support for this holding in the state cases of *State* v. *Harvey*, 402 P.2d 17, 19 (Ariz. 1965) and *People* v. *Greer*, 184 P.2d 512, 517 (Cal. 1947), both

holding that contributing to the delinquency of a minor is a lesser included offense to statutory rape.*

Therefore, we hold that an individual cannot be indicted in federal court for a crime after having been tried in Indian tribal court for a lesser included offense.

AFFIRMED.

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* We find no evidence of a significant difference in the substance of the state offenses dealt with in *Harvey* and *Greer* and the offenses involved here that would warrant distinguishing those two cases.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1509

DC# CR 75-550 WPC

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ANTHONY ROBERT WHEELER, DEFENDANT-APPELLEE

Appeal from the United States District Court for the District of Arizona (Phoenix)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 2, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1509

[Filed Mar. 23, 1977, U. S. Court of Appeals,
Emil E. Melfi, Jr., Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ANTHONY ROBERT WHEELER, DEFENDANT-APPELLEE

Before: GOODWIN and SNEED, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Goodwin and Sneed have voted to reject the suggestion for a rehearing in banc, and Judge East has recommended rejection of the suggestion for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

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* Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: March 21, 1977.

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